IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	:	Case No. 17-50241
WILLIAM E. & SHEILA M. BURKE,	:	Chapter 13
Debtor.	:	JUDGE PRESTON

DEBTORS' MOTION TO AVOID JUDICIAL JUDGMENT LIEN SECURED BY REAL ESTATE

Come now Debtors pursuant to *Bankruptcy Rules 3012* and *4003(d), 11 U.S.C. 502, 506(a),(d), 11 U.S.C. 522(f), 11 U.S.C. 1322(b)(2)*, *1325(a)(5), 11 U.S.C. 1327(b),(c), 11 U.S.C. 544,* and hereby MOVE this Honorable Court for an order finding that non-consensual judicial lien of **CAPITAL ONE BANK (USA), National Association ("Creditor")** [1] be avoided as this lien impairs the Debtors' statutory homestead exemption entitlement under *O.R.C. 2329.66(a).*

Debtors further MOVE the Court for a finding that such lien is not an interest secured by Debtors' realty, should be avoided on this additional basis, and forthwith released of record.

The factual and legal grounds supporting the relief requested are set forth in the Memorandum In Support below, and the Exhibits attached hereto, which are herein incorporated by reference.

Respectfully submitted,

/s/ Christopher J. Spiroff
Christopher J. Spiroff (0042247)
1180 South High Street
Columbus, Ohio 43206
614.224.2104
Fax: 614.224.2066
admin@spirofflaw.com
Case Attorney for Debtors

[1] Creditor is an FDIC-insured depository institution. Per the FDIC, Creditor changed its name from Capital One Bank to its current designation on November 22, 1994.

MEMORANDUM IN SUPPORT

I. FACTS RELEVANT TO MOTION TO AVOID JUDICIAL JUDGMENT LIEN

The Debtors own their residence located at 6049 Johnsville Road, Centerburg, OH 43011 as joint tenants. "Exhibit A". As of the order of relief, Debtors' real estate had a fair market value of $94,100.00. "Exhibit B". (Doc. # 15).

The Debtor's residence is subject to a consensual, first and best mortgage in favor of Nationstar Mortgage, LLC in the approximate amount of $159,400.00. This mortgage was duly recorded with the Knox County, Ohio Recorder on April 9, 2007 in Deed Book 1073, Page 333. Nationstar has yet to file a proof of claim in the case.

The Debtors' residence is subject to a non-consensual judicial judgment lien in favor of GE Retail Capital Bank k.n.a. Synchrony Bank the amount of $2,677.00. This lien was filed of record on November 25, 2013 in the Office of the Clerk of Court, Knox County, Ohio Court of Common Pleas. "Exhibit C". This entity has yet to file a claim in the case.

As of the order of relief, Debtors' residence is subject to a non-consensual judicial judgment lien in favor of Creditor in the amount of $3,567.00. This lien was filed of record on July 1, 2013, in the Office of the Clerk of Court, Knox County, Ohio Court of Common Pleas. "Exhibit D". This is the lien Debtors seek to avoid. Creditor has yet to file a claim in the case.

II. LEGAL AUTHORITY SUPPORTING AVOIDANCE OF JUDICIAL JUDGMENT LIEN

The Debtors are seeking to avoid a non-consensual judicial judgment lien against Debtor/Wife in favor of Creditor secured by the Debtors' primary residence. This lien impairs Debtor/Wife's statutory homestead exemption to which the Debtors are entitled. *O.R.C. 2329.66(A)(1).* Avoidance, and release of this lien is proper under the circumstances. *11 U.S.C. 522(f).*

Ohio has chosen to "opt out" of the federal exemption scheme. Exemptions available to Ohio debtors are based upon Ohio law. *In re Lewis,* 327 B.R. 645, 648 (Bankr. S.D. Ohio 2005), *citing In re Young,* 93 B.R. 590, 593 (Bankr. S.D. Ohio 1988). *O.R.C. 2329.66*(a) provides, in relevant part:

> Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows: ...(b) In the case of all other judgments and orders, the person's interest, not to exceed twenty-one thousand six hundred twenty-five dollars,[2] in one parcel or item of real or personal property that the person or a dependent of the person uses as a residence.

It is well-settled that a judicial lien on a debtor's property may be avoided pursuant to *11 U.S.C. 522(f)* to the extent that lien impairs a debtor's homestead exemption. *In re Holland,* 151 F.3d 547 (6th Cir. 1998). The avoidance statute, *11 U.S.C. 522(f)* provides, in relevant part:

> (1) ...the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under section (b) of this section, if such lien is -
>
> (A) a judicial lien...
>
> (2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of -
>
> (i) the lien;
>
> (ii) all other liens on the property; and
>
> (iii) the amount of the exemption that the Debtor could claim if there were no liens on the property exceeds the value that the debtor's interest in the property would have in the absence of any liens.

The law is clear in the Southern District of Ohio. Should the amount of the total impairment of a debtor's exemption exceed the amount of the lien sought to be avoided, the lien will be avoided

[2] Per the version of amended O.R.C. 2329.66(a) effective as of the order of relief, Debtor were each entitled to a homestead exemption of $136,925.00. Exemption statutes are to be applied as of the filing of the petition. *In re DePascale,* 496 B.R. 860, 872 (Bankr. N.D. Ohio 2013).

in full. *In re Kindall,* 508 B.R. 43 (Bankr. S.D. Ohio 2014). See also, *In re Oglesby,* 333 B.R. 788 (Bankr. S.D. Ohio 2005). In accord, *In re Staley*, 95 B.R. 548 (Bankr. S.D. Ohio 1989); *Buroker v. Raybourn,* 61 B.R. 10 (Bankr. S.D. Ohio 1986)*; In re Schmidt,* 36 B.R. 144 (Bankr. N.D. Ohio 1983); *Matter of Anderson,* 57 B.R. 953 (Bankr. S.D. Ohio 1986)*; In re James,* 75 B.R. 124 (Bankr. S.D. Ohio) 1987).

The mathematical calculation relevant to proving the exemption impairment, and the wholly unsecured status of these liens is as follows:

1st Mortgage Nationstar:	($152,000.00)
Creditor's Lien:	($ 3,567.00)
GE Retail Lien:	($ 2,677.00)
Debtor/Wife's Exemption:	($136,925.00)
Subtotal:	($295,169.00)
Wife's Interest in Realty:	$ 47,050.00
EXEMPTION IMPAIRMENT:	**($248,119.00)**.

Based upon the foregoing, the judgment lien of Creditor impairs Debtor/Wife's homestead exemption, is subject to avoidance in its entirety, and must be forthwith released of record. *11 U.S.C. 522(f)*. *In re Smith,* 267 B.R. 568, 577 (Bankr. S.D. Ohio 2001), citing *In re Holland,* 151 F.3d 547, 550 (6th Cir. 1998); see also *Kindall @ 47, supra.*

III. AUTHORITY MANDATING LIEN AVOIDANCE BASED UPON LACK OF EQUITY

Debtors seek to avoid the non-consensual judicial lien of Creditor on the additional basis that this lien is wholly unsecured, and not a secured interest in the Debtors' residence. *11 U.S.C. 506(a),* and *(d*). Per relevant portions of *11 U.S.C. 506(a)* and/or *(d)* in conjunction with *11 U.S.C.*

1322(b), 11 U.S.C. 1325(a)(5), and *11 U.S.C. 1327(b)* and *(c),* Creditor does not hold a secured interest in the Debtors' realty. *In re Claar,* 368 B.R. 670 (Bankr. S.D. Ohio 2007).

Debtors have standing to bring this contested matter per the Bankruptcy Code, Rules, and applicable legal precedent. *In re Dickson*, 427 B.R. 399 (6th Cir. B.A.P. 2010); *In re Barbee,* 461 B.R. 711 (6th Cir. B.A.P. 2011); *In re Engle,* 496 B.R. 456 (Bankr. S.D. Ohio 2013); *Simmons v. Fed. Home Loan Mortg. Corp. (In re* Simmons), 560 B.R. 308 (Bankr. S.D. OH 2016).

IV. RELIEF REQUESTED

It is requested that the judgment lien of Creditor be found to impair Debtor/Wife's statutory homestead exemption; that the same is wholly unsecured by any equity in the Debtors' residence, and is therefore, subject to avoidance in its entirety.

Therefore, the Debtors respectfully request this Honorable Court to issue an order avoiding and forthwith authorizing the release of the following non-consensual, judgment lien in favor of Creditor more particularly described as **13CJ-07-0589,** which was filed with the Clerk of Court, Knox County, Ohio Court of Common Pleas on July 1, 2013; to issue an order avoiding this lien in its entirety, and releasing and forthwith forever discharging the same of record, including all interest, penalties, costs, or any other charges related thereto; and that the Court grant the Debtors such other legal and equitable relief as this Court deems necessary and proper.

/s/ Christopher J. Spiroff

NOTICE OF FILING MOTION TO AVOID JUDICIAL JUDGMENT LIEN

The Debtors have filed papers with this Court requesting that the statutory judgment lien of Creditor be avoided by the Court, and released of record. **Your rights may be affected. You should read these papers carefully, and discuss this issue with your attorney, if you have one in this case. (If you do not have counsel in this case, it is recommended that you consult one).**

If you do not want the Court to grant the Debtors the relief requested in this Motion, or if you want the Court to consider your views on this Motion, then on or within **twenty-one (21)** days of the date of this Notice, you or your lawyer must file a written response with the Bankruptcy Court explaining your position at:

Clerk of Courts
United States Bankruptcy Court
170 North High Street
Columbus, OH 43215.

If you mail the request to the Court, be sure to mail it early enough so the Court will **receive** it on or before the dated stated above. You must also mail a copy to:

Frank M. Pees
Standing Chapter 13 Trustee
130 E. Wilson Bridge Rd., #200
Worthington, OH 43085-6300

Christopher J. Spiroff, Esq.
1180 South High Street
Columbus, OH 43206

U.S. Trustee
170 N. High Street, #200
Columbus, OH 43215.

If you or your attorney do not take these steps, the Court may decide that you do not oppose the relief sought in the Motion, and may enter an Order granting that relief.

3/7/17 */s/ Christopher J. Spiroff*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Motion was served either through electronic transmission, or by regular, first-class, U.S. Mail, postage pre-paid, upon the following parties in interest, on the date and as indicated below:

3/7/17 */s/ Christopher J. Spiroff*

served electronically through the Court's ECF System at the email address registered with the Court

Frank M. Pees, Chapter 13 Trustee
U.S. Trustee

served by certified U.S. Mail

Capital One Bank (USA), National Association, c/o Richard D. Fairbank, Chairman & CEO, 4851 Cox Road, Glen Allen, VA 23060

served by regular, first class U.S. Mail, postage pre-paid

William E. & Sheila M. Burke, 6049 Johnsville Road, Centerburg, OH 43011

Capital One, P.O. Box 30285, Salt Lake City, UT 84130

Capital One, 1500 Capital One Drive, Richmond, VA 23238

Javitch, Block, & Rathbone, 1100 Superior Avenue, 19th Floor, Cleveland, OH 44114-2531

Kohls/Capital One, N56 W. 17000 Ridgewood Drive, Menomee Falls, WI 5301-5660

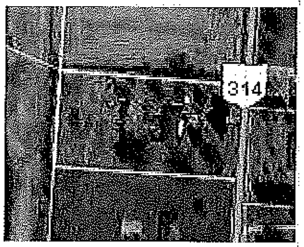
Kohls/Capital One, P.O. Box 3120, Milwaukee, WI 53201-3120

A

Data For Parcel 17-00029.000

Base Data

Parcel:	17-00029.000
Owner:	BURKE WILLIAM E & SHEILA M
Address:	6049 JOHNSVILLE RD



[+] Map this property.

Tax Mailing Address

Tax Mailing Name:	CORELOGIC
Address:	1 FIRST AMERICAN WAY
City State Zip:	WESTLAKE TX 76262

Owner Address

Owner Name:	BURKE WILLIAM E & SHEILA M
Address:	6049 JOHNSVILLE RD
City State Zip:	CENTERBURG OH 43011

Geographic

City:	UNINCORPORATED
Township:	HILLIAR TOWNSHIP
School District:	CENTERBURG LSD

Legal

Legal Acres:	1.84	**Homestead Reduction:**	NO
Legal Description:	15 5 1 S E PT OF 23 1.84A	**2.5% Reduction**	YES
Land Use:	510 - SINGLE FAMILY DWLG OWNER OCCUP	**Foreclosure:**	NO
Neighborhood:	11701	**Board of Revision:**	NO
Number Of Cards:	1	**New Construction:**	NO
Annual Tax (Does not include delinquencies.):	$1,428.94	**Divided Property:**	NO
Map Number:		**Routing Number:**	17-00171-137000

Report Discrepancy

GIS parcel shapefile last updated 2/10/2017 12:01:36 AM.
CAMA database last updated 2/10/2017 2:17:37 AM.

Main File No. N-50241 | Page #1

Client Atty C Spiroff
17-50241

B

REAL ESTATE VALUE ESTIMATE

SUBJECT

Contact WILLIAM E AND SHEILA M BURKE — Census Tract 0077.00 — Map Reference N/A
Property Address 6049 Johnsville Rd — Check one: ☒ SF ☐ PUD ☐ CONDO ☐ 2-4 Units
City Centerburg — County KNOX — State OH — Zip Code 43011
Phone No. Res. N/A — Loan Amount $ N/A — Term N/A — Mos. Owner's Est. of Value $ N/A

No. of Rooms	No. of Bedrooms	No. of Baths	Family room or den	Gross Living Area	Garage/Carport (specify type & no.)	Porches, Patio or Pool (specify)	Central Air
6	3	1	☐ Yes ☒ No	1,372 Sq. Ft.	2 CAR ATTCH	PORCH	☒ Yes ☐ No

FIELD REPORT

NEIGHBORHOOD

Location	☐ Urban	☐ Suburban	☒ Rural
Built Up	☐ Over 75%	☒ 25% to 75%	☐ Under 25%
Growth Rate ☐ Fully Dev.	☐ Rapid	☒ Steady	☐ Slow
Property Values	☐ Increasing	☒ Stable	☐ Declining
Demand/Supply	☐ Shortage	☒ In Balance	☐ Oversupply
Marketing Time	☐ Under 3 Mos.	☒ 4-6 Mos.	☐ Over 6 Mos.

	Good	Avg	Fair	Poor
Property Compatibility	☐	☒	☐	☐
General Appearance of Properties	☐	☒	☐	☐
Appeal to Market	☐	☒	☐	☐

Present Land Use 70% 1 Family ___ % 2-4 Family ___ % Apts. ___ % Condo 10% Commercial ___ % Industrial 20 % Vacant ___ %
Change in Present Land Use ☒ Not Likely ☐ Likely ☐ Taking Place From ___ To ___
Predominant Occupancy ☒ Owner ☐ Tenant 0 % Vacant
S/F Price Range $ 19,000 to $ 200,000 — $ 100,000 = Predominant Value
S/Family Age 0 yrs. to 150 yrs. Predominant Age 50 yrs.

Comments including those factors affecting marketability (e.g. public parks, schools, view, noise) COUNTY RD 111 TO THE NORTH, UPDIKE RD TO THE SOUTH, ROUTE 3 TO THE EAST, HALL RD TO THE WEST. LOCATED AMONG PROPERTIES WITH A VARIETY OF STYLES, VALUES AND APPEALS. AVERAGE ACCESS TO MAJOR ROADWAYS. ROUTES 3/36 10 MINUTES. CENTERBURG LOCAL SCHOOLS. LOCAL SHOPPING, CHURCHES, PARKS & RECREATION.

SUBJECT PROPERTY

Approx. Yr. Blt. 19 71 # Units 1 # Stories 1
Type (det, duplex, semi/det. etc.) DETACHED
Design (rambler, split, etc.) RANCH
Exterior Wall Mat. VINYL — Roof Mat. COMP ASPHALT
Is the property in a HUD-Identified Special Flood Haz. Area? ☒ No ☐ Yes

PROPERTY RATING	Good	Avg	Fair	Poor
Condition of Exterior	☐	☒	☐	☐
Compatibility to Neighborhood	☐	☒	☐	☐
Appeal and Marketability	☐	☒	☐	☐

Special Energy-Effic. Items UNABLE TO VERIFY - APPRAISER UNABLE TO GAIN ENTRY. APPRAISER RESERVES THE RIGHT TO AMEND APPRAISAL IF INTERIOR INSPECTION IS WARRANTED.

Comments (favorable or unfavorable incl. deferred maintenance) AVERAGE EXTERIOR CONDITION. ROOF & GUTTERS APPEAR TO BE FUNCTIONAL. PURPOSE OF THIS APPRAISAL IS TO ESTIMATE MARKET VALUE. HIGHEST AND BEST USE SINGLE FAMILY RESIDENTIAL. EXTERIOR INSPECTION ONLY. INTERIOR BELIEVED TO BE CONSISTENT WITH EXTERIOR.

MARKET COMPARABLE ANALYSIS

ITEM	SUBJECT	COMPARABLE NO. 1		COMPARABLE NO. 2		COMPARABLE NO. 3	
Address	6049 Johnsville Rd Centerburg, OH 43011	1832 Rich Hill Rd Centerburg, OH 43011		6761 White Rd Centerburg, OH 43011		5308 Star St Centerburg, OH 43011	
Proximity to Sub.	N/A	2.12 miles W		3.97 miles SE		2.00 miles W	
Sales Price	$ N/A		$ 86,000		$ 100,000		$ 106,000
Date of Sale and Time Adjustment	DESCRIPTION	DESCRIPTION	+(–)$ Adjust.	DESCRIPTION	+(–)$ Adjust.	DESCRIPTION	+(–)$ Adjust.
	N/A	05/26/2016		04/12/2016		05/23/2016	
Location	CENTERBURG	CENTERBURG		CENTERBURG		CENTERBURG	
Site/View	RURAL	RURAL		RURAL		RESIDENTIAL	
Age	46	57		41		44	
Condition	AVERAGE	AVERAGE		AVERAGE		AVERAGE	
Living Area Rm. Count and Total (Total / B-rms. / Baths)	6 / 3 / 1	7 / 4 / 2.5	-4,500 / -3,000	6 / 3 / 2	-3,000	7 / 4 / 1	-3,000
Gross Living Area	1,372 Sq. Ft.	1,827 Sq. Ft.	-6,825	1,456 Sq. Ft.	-1,260	1,456 Sq. Ft.	-1,260
Air Conditioning	YES	YES		NO	+1,000	NO	+1,000
Garage/Carport	2 CAR ATTACH	N/A	+2,000	2 CAR ATTACH		2 CAR DETACH	
Porches, Patio, Pools, etc.	PORCH SHED	PORCH PATIO/SHED	-1,000	STOOP SCR PCH/SHED	+1,000 / -1,000	STOOP SHED	+1,000
Special Energy-Efficient Items	N/A N/A	INSL WINDOWS N/A		INSL WINDOWS FIREPLACE	-1,000	INSL WINDOWS WD BURN STV	-1,000
Other	FULL BASEMENT	FULL BASEMENT		PART BASEMENT	+1,000	CRAWL	+1,500
Net Adjust (Total)		☐ + ☒ –	$ -13,325	☐ + ☒ –	$ -3,260	☐ + ☒ –	$ -1,760
Indicated Value Sub.			$ 72,675		$ 96,740		$ 104,240

General Comments FOR BANKRUPTCY COURT USE ONLY. DATA SOURCES REALIST, MLS AND PUBLIC RECORDS. SALES COMPARISON APPROACH USED IN THE FINAL ANALYSIS.

Estimated Value $ 94,100 as of JANUARY 30, 2017

Completed By JAMES SMOOT — Title APPRAISER
Signature [signature] — Date January 31, 2017

[Y2K]

C

13CJ11-0900 GE CAPITAL RETAIL BANK vs. BURKE, WILLIAM RDW

Case Type	CERTIFICATE OF JUDGMENT	**Action:**	(30) CERTIFICATE OF JUDGMENT
Case Status:	Open	**Status Date:**	11/25/2013
File Date:	11/25/2013	**Case Judge:**	WETZEL, RICHARD D
DCM Track:		**Next Event:**	

All Information | Party | Judgment | Docket | Financial | Receipt | Disposition

Liens/Judgments

Court MUNICIPAL	**County** KNOX	**State** OH	**Rendered Date** 04/29/2013
Case # 13CVF00017	**Foreign #**	**Execution #**	
Case Title	GE CAPITAL RETAIL BANK vs WILLIAM BURKE	**Attorney**	
Journal 96	**Page** 209	**Filed** 12:45 PM	**Released**
Serial #	**Tax Account #**	**Tax Amount**	
Tax Lien Rendered	**Tax Lien Released**	**Execution Case #**	

Judgments:

Amount	Interest	Per	From Date	Cost
$2,759.34	3	ANNUM	04/29/2013	

D

13CJ07-0589 CAPITAL ONE BANK vs. BURKE, SHEILA E RDW

Case Type	CERTIFICATE OF JUDGMENT	**Action:**	(30) CERTIFICATE OF JUDGMENT
Case Status:	Open	**Status Date:**	07/01/2013
File Date:	07/01/2013	**Case Judge:**	WETZEL, RICHARD D
DCM Track:		**Next Event:**	

All Information | Party | Judgment | Docket | Financial | Receipt | Disposition

Liens/Judgments

Court MUNICIPAL	**County** KNOX	**State** OH	**Rendered Date** 04/30/2013
Case # 13CVF00025	**Foreign #**	**Execution #**	
Case Title	CAPITAL ONE BANK vs SHEILA E BURKE	**Attorney**	
Journal 95	**Page** 148	**Filed** 10:06 AM	**Released**
Serial #	**Tax Account #**	**Tax Amount**	
Tax Lien Rendered	**Tax Lien Released**	**Execution Case #**	

Judgments:

Amount	Interest	Per	From Date	Cost
$3,165.56	3	ANNUM	04/30/2013	